NO. 43736-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LANCE WILLIAM EVANS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 12-1-00934-3

BRIEF OF RESPONDENT

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1. Procedure

On March 14, 2012 defendant, LANCE WILLIAM EVANS, was arrested by police for being an armed unwanted party in the apartment of another. He was arraigned the following day and entered not guilty pleas to one count of unlawful possession of a firearm in the second degree and a misdemeanor of carrying a weapon capable of producing harm.

On June 26, 2012 the trial court presided over CrR 3.5 and 3.6 hearings. The parties briefed both matters. CP 4-24, 26-32. Officers Prater and Hamilton testified for both motions and counsel argued their respective positions. RP 4-46.

The Court held the defendant's statements were admissible because they were made after defendant was properly advised of his rights and that he knowingly and voluntarily waived those rights. CP 88-90, 116, RP 47-48.

The trial court also held the officers lawfully confiscated the defendant's firearm after obtaining his consent. CP 91-96, RP 48-50.

After the rulings the parties reached a resolution. The State submitted an amended information dismissing the second count of the information, and the defendant entered a *Statement of Defendant as to Stipulation to the Sufficiency of the Evidence to Support the Charge,* hereinafter *Stipulation.* CP 33, 115-116. The *Stipulation* was a waiver of the defendant's substantive rights as if entering a plea of guilty. However, the *Stipulation* specifically preserved defendant's right to appeal the trial court's CrR 3.6 ruling which he has essentially tried to replace on appeal with a challenge to his arrest. After the Court read the submitted police reports and considered the officer's testimony, the trial court found defendant guilty of the remaining count, unlawful possession of a firearm in the second degree. CP 54-79, 115-116, RP 57-58.

The defendant timely filed this appeal.

2. Facts

At 9:00 p.m. on March 14, 2012 dispatchers broadcast a call of an unwanted man with a weapon holding people in an apartment. CP 64, 68, RP 5, 20. Several officers responded, including Officers Prater and Hamilton. CP 54-79. Officer Prater testified he was responding to what

he referred to as a "high risk incident." RP 6. Officer Hamilton testified the dispatcher referred to a man holding the reporting party's daughter at gunpoint. RP 20. Officer Prater and another officer arrived before Hamilton and learned the defendant was just inside the apartment door. RP 6. Because of the high risk nature of the call, instead of approaching him, they summoned the defendant out of the apartment, instructed him to lay facedown on the ground and handcuffed him. RP 6-7. The initial call also stated that the reporting person had last seen the defendant with the handgun. She told officers he had taken it from a bag or "man purse" when inside the apartment. RP 68. The ladies confirmed the defendant brought the bag into the apartment with him. CP 68. The tenant of the apartment, Ms. Whitcraft, pointed out the bag to officers that the defendant left inside the apartment. Defendant tried to hide it near a chair where he had been sitting when officers arrived. CP 65. Ms. Whitcraft told the officer she did not want the bag in her home and asked the officer to take it. CP 65. Officer Hamilton took the "man purse" or bag outside. CP 65, RP 22. Hamilton testified at that point he was collecting it for safekeeping. RP 23.

Defendant denied any knowledge or ownership of the bag several times. CP 65, 69, RP 11, 24, 30. However when quizzed whether his fingerprints would be found on anything in the bag, he changed his story

and admitted the bag was his. CP 65, 69, RP 12-13, 24, 30-31. In addition to admitting the bag belonged to him, he told the officers they would find knives, a handgun, a magazine, and a round in the chamber of the gun in the bag. CP 65, 69, RP 13, 24. Officer Hamilton asked appellant if he could take possession of the bag and look inside. CP 65, RP 24, 31. Defendant gave his consent. RP (Hamilton/hrg). Officer Hamilton testified on cross-examination that he was going to have to "secure whatever is in [the bag] prior to booking...." RP 29. The officers examined the bag and found items as described by defendant: several knives, a handgun, a gun magazine, and a loose bullet. CP 65, 69. Defendant also stated he had previously been convicted of a felony and could not lawfully possess firearms. CP 65.

On June 26, 2012 the trial court held both a CrR 3.5 and 3.6 hearing. Two officers testified, Prater and Hamilton, regarding the events surrounding defendant's arrest and the confiscation of the firearm. RP 4-32. Following the hearing, the trial court entered *Findings and Conclusions on Admissibility of Evidence CrR 3.5,* hereinafter *3.5 Findings*, CP 88-90, and *Finding of Fact and Conclusions of Law, Admissibility of Statement[s], CrR 3.6*, hereinafter *3.6 Finding.* CP 91-96.

The trial court concluded the defendant was called out of the victim's apartment where he was unwanted. CP 65, 68. The defendant

was detained and informed of his rights, which he waived. CP 65, 68, RP 7-10. The officers subsequently removed the bag from the apartment. When confronted, he ultimately admitted the bag was his and they would find a gun inside.

The 3.6 *Findings* further included that Officer Hamilton asked if could take custody of the bag, and the defendant consented. CP 91-96.

The trial court concluded the defendant was properly advised of his rights when detained and when confronted about the bag 10-15 minutes later, he gave the Officer Hamilton permission to look inside the bag. *Id.*

The court's *3.5 Findings* included defendant's statements denying any property inside the apartment or any ownership in a bag. The *3.5 Findings* also note that Officer Hamilton informed the defendant the bag was going to booked into safekeeping and the items inside needed to be secure. The officers testified and the trial court concluded that the defendant's demeanor, attitude and compliance lead officers to reasonably conclude there was no reason to believe the defendant's waiver of his rights was anything "less than knowing, intelligent, and voluntary." CP 89. Furthermore, defense conceded the State had met its burden in showing the statements were knowing, intelligent, and voluntary. *Id.* The trial court formally concluded the waiver of rights and subsequent statements were voluntary. CP 88-90.

At the conclusion of the hearings, defense counsel consulted with her client, who afterward, entered *Statement of Defendant as to Stipulation to the Sufficiency of the Evidence to Support the Charge,* hereinafter *Stipulation.* CP 110-114, RP 50-57. The *Stipulation* contains the rights that defendant gives up by entering a stipulation to facts sufficient for the court to enter a finding of guilt to the charge. Furthermore, this *Stipulation* states the defendant is giving up all the traditional rights, but also preserves his right to appeal the search issue. To allow for the *Stipulation,* the defendant also executed a *Waiver of Jury Trial.* CP 109.

Pursuant to the *Stipulation,* the trial court reviewed the submitted police reports, property reports, and handwritten statement by the victim. CP 54-79. The court found the defendant guilty and entered his finding and held sentencing. The defendant was advised of his rights to appeal. Lastly, the trial court also entered *Findings Following Stipulation by the Parties to the Sufficiency of the Evidence and the Court's Finding of Guilt,* hereinafter, *Stipulation Findings.* CP 88-90.

The *Stipulation Findings* specify the initial *Stipulation* was reviewed with the defendant by the court and found the waiver of those rights knowing, intelligent, and voluntary. CP 115-116.

C. ARGUMENT.

1. RAP 2.5(a)(3) PRECLUES THE DEFENDANT FROM CHALLENGING HIS ARREST FOR THE FIRST TIME ON APPEAL.

a. May appellant challenge his arrest for the first time on appeal when, under the facts of this case, there is no manifest constitutional error?

As a general rule, appellate courts will not consider issues raised for the time on appeal. RAP 2.5(a). *Errors Raised for First Time on Review.*

RAP 2.5(a) provides in part:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:
> (1) lack of trial court jurisdiction;
> (2) failure to establish facts upon which relief can be granted, and
> (3) manifest error affecting a constitutional right.

See Appendix A.

Courts have said, "'permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.'" ***State v. Lynn***, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). The exception afforded by the court rule is not intended to be a "means for obtaining new trials whenever they can identify some constitutional issue not raised

before the trial court. Rather, the asserted error must be 'manifest'--i.e., it must be 'truly of constitutional magnitude.'" ***State v. Scott***, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). But if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

To show he was actually prejudiced by trial counsel's failure to challenge the probable cause for his arrest, the appellant must show the trial court likely would have granted the motion. ***State v. McFarland***, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). It's not enough the defendant *allege* prejudice---actual prejudice must appear in the record. *Id.* [Emphasis added]. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3). *Id.* We must therefore review the record to assess whether appellant's claim of manifest constitutional error is present.

b. <u>If appellant may challenge his arrest, was there probable cause to arrest appellant?</u>

There was reasonable and articulable suspicion to detain defendant, and probable cause to arrest him.

In this case, the trial court learned from testimony of the officers and the submitted reports that the officers responded to a 911 call of an

armed man in an apartment. The information also included the apartment was not his and that he was not welcome there. The reporting party or "R/p" said the man was holding the caller's daughter against her will. CP 64.

The officers testified they considered this a high-risk situation given the nature of the call and that it involved a gun. The trial court considered the submitted reports, as well as motion testimony. CP 115-116, RP 57.

In his report, Officer Prater stated that upon arrival he contacted the caller and confirmed the call, i.e., man inside her apartment waiving around a gun not allowing her daughter to leave. CP 68. Officer Hamilton's report also indicates that Officer Prater confirmed with the victim the appellant had a gun, causing her to run and summon police. CP 65. He asked her where she last saw the gun and she told Officer Prater she last saw it on appellant. CP 68. Witnesses previously inside the apartment told officers that appellant retrieved the gun from a "man purse." *Id.*

Based upon their information on arrival, officers immediately directed their attention to the apartment. Shortly afterward they observed appellant inside the identified apartment. CP 68, RP 6. After a brief exchange, defendant complied with instructions and stepped outside the

open door. He was detained by the officers who instructed him to lay face down on the ground, which he did. CP 68, RP 6-7.

While detained, and after he was advised of, and waived his rights, officers asked appellant about the bag and the gun. He initially denied any knowledge of the bag. Meanwhile, another officer was in the apartment when one of the witnesses (Whitecraft) pointed out the bag containing the firearm. CP 65. Officer Hamilton testified the ladies wished the bag removed from their apartment. CP 65, RP 22. He took possession of the bag for safekeeping. RP 23, 28. Officers again asked defendant if the bag was his, and again he denied any association with it. RP 24. The officer then asked if his fingerprints would be on anything in the bag and eventually he acknowledged there would be a handgun, magazine, a round, and several knives in the bag. *Id.* Hamilton testified he asked defendant if he could take possession and search the contents, and defendant gave him permission. RP 24, 29. As a result of obtaining defendant's consent, the officers discovered the firearm.

Police officers may conduct an investigatory stop or "detain" if they have a reasonable and articulable suspicion that an individual is involved in criminal activity. ***State v. Sieler***, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980). That is, if they suspect "a substantial possibility that criminal conduct has occurred or is about to occur." ***State v. Kennedy***,

107 Wn.2d 1, 5, 726 P.2d 445 (1986). We consider the totality of the circumstances known to the officer at the time of the stop. ***State v. Rowe***, 63 Wn. App. 750, 753, 822 P.2d 290 (1991). And the determination of reasonable suspicion "'must be based on commonsense judgments and inferences about human behavior.'" ***State v. Lee***, 147 Wn. App. 912, 917, 199 P.3d 445 (2008) (quoting ***Illinois v. Wardlow***, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)).

Based upon the record, and particularly the trial court's findings, there was clearly ample probable cause to arrest the defendant. As a result, it is not likely the court would have granted a motion to suppress defendant's arrest. The last examination is, given the facts available to the court, was the arrest lawful.

c. Was defendant lawfully arrested?

The record leads to only one conclusion: the defendant was lawfully arrested.

In what appears to be a brief amount of time, the officers responded to the call, confirmed the details with the initial caller, identified and detained the suspect, located a "purse" or bag inside the ladies' apartment, were asked to remove the bag, interviewed defendant about it, and determined the origins of the firearm. It is evident the officers had ample grounds to contact, detain and ultimately arrest

defendant for unlawfully possessing a firearm. It is also possible he could have been arrested for assault, trespass--if not burglary, and potentially for delaying the officers' investigation.

The record available indicates that appellant's ultimate arrest was lawful and there was a reasonable and articulable suspicion to detain defendant and later, sufficient probable cause to arrest him.

A motion challenging his arrest would have been futile. There is no reasonable likelihood that the motion would have been granted. Defendant's argument fails.

2. DEFENDANT RECIEVED EFFECTIVE COUNSEL.

a. Appellant cannot make the necessary showing required by *Strickland v. Washington* that trial counsel's representation was deficient when defendant was lawfully arrested.

There is a strong presumption of effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. ***State v. McFarland***, 127 Wn.2d 322, 335. Because this is not a personal restraint petition, the issue must be decided based on the trial records identified on appeal. *Id.*

To demonstrate ineffective assistance of counsel, the defendant must meet the test announced in ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must show (1) counsel's performance was objectively unreasonable; and (2) the deficient performance prejudiced the defense. ***State v. Denny,*** ___ Wn. App. ___, 294 P.3d 862 (Feb. 13, 2013) citing ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied,* 479 U.S. 922 (1986).

In this case, trial counsel briefed both the CrR 3.5 and 3.6 issues, cross-examined officers, and argued for suppression of the firearm. CP 4-32.

Counsel was clearly well versed with the facts and the law. After the motion, she continued to negotiate for her client while still preserving his appellate rights. RP 54-57. Review of the record does not support defendant's claim he received ineffective assistance of counsel. He has failed to show trial counsel's representation at trial was deficient and certainly not objectively unreasonable. His claim therefore fails the first prong of the ***Strickland*** test.

Since appellant cannot demonstrate his counsel was ineffective, he cannot meet the second prong of ***Strickland***. Based on the record, he cannot show that the result of the proceeding would have been different

but for any alleged deficiency of representation. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The record reveals ample evidence to deny a motion to suppress defendant's arrest. The officers responded to a high risk call. Officer Hamilton testified he left another call he was tending to respond to this, more exigent, incident. CP 64. This call involved a firearm and civilians being held against their will. Once on scene, officers confirmed the nature of the call, the location of events, and the persons involved. Defendant could be seen through the open doorway of the identified apartment. Officers did the logical and safest thing which was to call out to defendant rather than closely approach him. Though slightly reluctant, defendant complied and stepped out of the apartment. It is significant to note that he was not in his residence, but in the home of the victims. The victim's mother had already reported that appellant was an unwanted person that had refused to leave. After advising defendant of his rights, defendant spoke with officers. He ultimately admitted the bag was his and described the contents. He also admitted he knew it was unlawful for him to possess a firearm. The record contains significant facts to support probable cause to arrest defendant. There is nothing in the record that indicates the arrest should have been suppressed. Therefore, defendant cannot support the argument the proceedings would have resulted in a different outcome if

there is nothing in the record to believe the motion would have been granted. The defendant's argument of ineffective assistance of counsel must fail.

b. Agreeing to a stipulated trial does not equate to ineffective assistance of counsel when defendant knowingly, voluntarily, and intelligently waived his right to jury trial.

Defendant wishes to bootstrap his argument by asserting that entering into a stipulated trial, including one that preserves issues for appeal, is *per se* deficient. However, in addition to being illogical, it is also without authority.

There is nothing in the record to support an argument that the stipulation utilized in the case is unusual or otherwise a deviation from reasonable practice.

The timing of the stipulation itself is telling. It was only after the parties had held both a CrR 3.5 and 3.6 hearing that the parties entered into the stipulation. The colloquy with the judge demonstrates the purpose of the stipulation. RP 53-57. It allowed defendant's CrR 3.6 issue to be preserved, while also allowing him to take advantage of the amended information. CP 33.

The colloquy cited above demonstrates the pains the court and the parties took to ensure that appellant knew the nature of the arrangement he

was entering into, as well as the rights he was giving up by doing so. The trial judge specifically discussed with defendant the rights he was foregoing by entering into the *Stipulation.* The *Stipulation* itself similarly provided appellant written notice of the rights he was giving up and the effect of entering into the agreement with the State. CP 110-114.

In addition to the colloquy with the court and the written contents of the *Stipulation,* there is also the representations by defense counsel to be considered. She first requested leave of the court to spend time with her client to review the *Stipulation* and to converse meaningfully about it with him. RP 50-52. Later she informed the court that she has discussed the *Stipulation* with him and she was confidant that the defendant understands the rights he is giving up as well the ramifications of the *Stipulation.* RP 51-52.

Defendant was entitled to waive his right to jury trial. It is well-settled law that even constitutional rights can be waived. ***State v. Bennett***, 42 Wn. App. 125, 128, 708 P.2d 1232 (1985) (citing ***State v. Myers***, 86 Wn.2d 419, 426, 545 P.2d 538 (1976). The waiver of a constitutional right must be voluntary, knowing, and intelligent. ***In re Matter of James,*** 96 Wn.2d 847, 851, 640 P.2d 18 (1982).

The definition of 'waiver' is "an intentional relinquishment or abandonment of a known right or privilege." ***State v. Harris***, 154 Wn.

App. 87, 95, 224 P.3d 830 (2010) quoting ***State v. Riley***, 19 Wn. App. 289, 294, 576 P.2d 1311 (1978).

"[W]aiver of the right to a 12–person jury may be shown by a personal statement from the defendant expressly agreeing to waiver or an indication that the judge or defense counsel discussed the issue with the defendant prior to the attorney's waiving the right." (Citing ***State v. Stegall***, 124 Wn.2d 719, 729, 881 P.2d 979 (1994)). CP 109, RP 53-57.

We examine the totality of the circumstances to determine if the waiver was made voluntarily and with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." ***State v. Bradford***, 95 Wn. App. 935, 944, 978 P.2d 534 (1999) (quoting ***Moran v. Burbaine***, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)).

c. Defendant was not deprived of effective assistance of counsel when he properly waived his right to trial and entered the stipulation in lieu of jury trial?

The record supports only one conclusion, and that is the defendant knowing, voluntarily, and intelligently waived his right to a jury trial. There is no evidence, nor any authority to support defendant's argument that his waiver was the result of ineffective assistance of counsel. Because the record clearly supports the trial court's finding the defendant

knowingly, voluntarily, and intelligently waived his right to jury trial, the defendant's claim of ineffective assistance of counsel must fail.

D. CONCLUSION.

The defendant is precluded from challenging his arrest for the first time on appeal because the record does not reflect any manifest constitutional error because he received effective assistance of counsel.

The defendant was entitled to waive his right to jury trial. He knowingly, voluntarily, and intelligently waived his right to jury trial with benefit of counsel and examination by the court. Based upon the totality of the record, it is clear the defendant received effective assistance of counsel.

The State requests this Court affirm defendant's conviction for unlawful possession of a firearm in the second degree.

DATED: March 12, 2013

MARK LINDQUIST
Pierce County
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KAWYNE A. LUND
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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/12/13 [signature]
Date Signature

APPENDIX "A"

RAP 2.5

C

West's Revised Code of Washington Annotated Currentness
Part III Rules on Appeal
Rules of Appellate Procedure (Rap)
Title 2. What Trial Court Decisions May Be Reviewed--Scope of Review
RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) *Generally.* A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) *Security.* If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) *Conflict With Statutes.* In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appel-

late court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

CREDIT(S)

[Amended effective September 1, 1985; September 1, 1994.]

Current with amendments received through 12/1/12

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